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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 9, 22, and 52

[FAR Case: 2013-020; Docket No. 2013-0020; Sequence No. 1]

RIN 9000-AM74

Federal Acquisition Regulation: Information on Corporate Contractor Performance and Integrity

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 to include in the Federal Awardee Performance and Integrity Information System (FAPIIS), to the extent practicable, identification of any immediate owner or subsidiary, and all predecessors of an offeror that held a Federal contract or grant within the last three years. The objective is to provide a more comprehensive understanding of the performance and integrity of the corporation before awarding a Federal contract.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addresses shown below on or before **[insert date 60 days after publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2013-020 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2013-020". Select the link "Comment Now" that corresponds with "FAR Case 2013-020." Follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2013-020" on your attached document.

- Fax: 202-501-4067.

- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street, NW, 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite "FAR Case 2013-020" in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202-219-0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAR Case 2013-020.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement section 852 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) with regard to Federal contracts. Section 852 requires that the FAPIIS include, to the extent practicable, information on any parent, subsidiary, or successor entities to a corporation in a manner designed to give the acquisition officials using the database a comprehensive understanding of the performance and integrity of the corporation in carrying out Federal contracts and grants. This proposed rule addresses the collection of information with regard to offerors that are responding to a solicitation for a Federal contract. The data on immediate owner and direct subsidiaries of an entity will be available through FAPIIS, based on the data obtained from offerors in response to the FAR provision 52.204-17, Ownership or Control of Offeror,

which was published in the Federal Register at 79 FR 31187, on May 30, 2014, as a final rule under FAR Case 2012-024.

II. Discussion and Analysis

A. Information required.

1. Owner/subsidiary (proposed FAR 9.104-6(a)(2)(i)).

After reviewing section 852, the Defense Acquisition Regulation Council and the Civilian Agency Acquisition Council (the Councils) determined that the further the distance between the entities, the less relevant the information is likely to be for establishing responsibility of the offeror. Furthermore, the cost and complexity maintaining a system that monitors the interrelationships of companies and their changes in ownership, and direct and indirect subsidiaries that could occur may be resource intensive for both the Government and the contractor and outweigh the benefits. Therefore, the Councils have determined that it is not practicable to establish interrelationships beyond the immediate owner and the direct subsidiary. The data on the immediate owner of an entity will be available through FAPIIS, based on the data obtained from offerors in response to the FAR provision 52.204-17, Ownership or Control of Offeror, which was published in the Federal Register at 79 FR 31187, on May

30, 2014, as a final rule under FAR Case 2012-024, effective November 1, 2014. This proposed rule 2013-020 will not be finalized until after the final rule under FAR Case 2012-024 becomes effective. For discussion of subsidiaries, see the information below in paragraph B.

2. Predecessor/successor (proposed FAR 9.104 6(a)(2)(ii)).

Although the law requested information on successor entities, the Councils concluded that any entity making an offer would have to be the successor, because by definition the predecessor no longer exists, having been replaced by the successor. Therefore, the proposed provision requests offerors to provide information about all predecessors of the offeror that received a Federal contract or grant within the last three years. The information on predecessors of the offeror provided from the proposed provision at FAR 52.204-WW will be shown with the entity's record in the System for Award Management (SAM) and in FAPIIS.

With regard to identification of predecessors, the Councils have limited the identification of predecessor entities to within the last three years. This timeframe is consistent with the period required by FAR 42.1503(g) for consideration of most past performance information, and the

timeframe generally used when reviewing prospective contractor's integrity and past performance information within the last three years to make a responsibility determination.

B. Source of information on ownership and predecessor of offeror.

By obtaining the information on ownership directly from each offeror, the Government can define exactly what information it is seeking. Furthermore, there is already a final FAR rule (FAR case 2012-024, Commercial and Government Entity Code (CAGE), published in the Federal Register at 79 FR 3118, on May 30, 2014; effective November 1, 2014) that provides information on owners of each offeror. It is not necessary to request information on subsidiaries from the offeror, because if the subsidiary is in the SAM database, the subsidiary will provide the information on its immediate owner, which would then be shared with FAPIIS. If the subsidiary has not received any Government awards, the subsidiary will have no information available in FAPIIS, making it unnecessary for the owner to identify such a relationship. The following example demonstrates how FAPIIS will link owners with subsidiaries:

If companies B, C, and D have reported that—

B is owned by A;

C is owned by A; and
D is owned by C,
Then FAPIIS will identify—
Subsidiaries B and C for offeror A;
Owner A for offeror B;
Owner A and subsidiary D for offeror C; and
Immediate owner C (not higher-level owner A) for
offeror D.

The Councils propose a new provision 52.204-WW,
entitled "Predecessor of Offeror" to gather information on
all predecessors of the offeror that held a Federal
contract or grant within the last three years.

**C. Definitions (proposed FAR 52.204-WW and FAR
52.204-17(a)).**

1. "Owner." The proposed definition of the term
"owner" is consistent with the definition in the provision
52.204-17, Ownership or Control of Offeror (see final rule
for FAR Case 2012-024, Commercial and Government Entity
Code, published in the Federal Register at 79 FR 31187, on
May 30, 2014 and effective November 1, 2014).

2. "Subsidiary." The term "subsidiary" is used
throughout the FAR without definition, except as used with
regard to inverted domestic corporations (FAR 9.108-1).
The Councils have not defined "subsidiary" in this case,

because it is necessary for the term "subsidiary" to be the exact reverse of the term "immediate owner." Any offeror that identifies an entity as its immediate owner is the subsidiary of that other entity. These relationships will be identified in FAPIIS, based on the identified immediate owners. Therefore, it is unnecessary to define "subsidiary."

3. "Predecessor" and "successor." The Councils have proposed definitions of "predecessor" and "successor" to be included in paragraph (a) of the proposed provision 52.204-WW, Predecessor of Offeror. The term "successor" does not include new offices/divisions of the same company. An entity that has only changed its name will not be considered to be a successor. Identification of changes in name is not necessary for purposes of this case, because as long as the CAGE Code is still the same, FAPIIS will provide the prior information relating to the entity. A "predecessor" means an entity that is replaced by a successor and includes any predecessors of the predecessor. A "successor" means an entity that has replaced a predecessor by acquiring the assets and carrying out the affairs of the predecessor under a new name (often through acquisition or merger). The term "successor" does not include new offices/divisions of the same company or a

company that only changes its name. The extent of the responsibility of the successor for the liabilities of the predecessor may vary, depending on State law and specific circumstances.

D. Use of information on other entities. FAR 9.104-3(c) already sets forth the FAR policy on consideration of the integrity and past performance of affiliates, which as defined in the FAR includes owners and subsidiaries, when they may adversely affect the prospective contractor's responsibility. The Councils have not proposed any change to this policy because it is adequate to protect the interests of the Government.

E. Availability to the public. The statute specifically requires the additional information on corporate structure to be available "in a manner designed to give the acquisition officials using the database a comprehensive understanding of the performance and integrity of the corporation in carrying out Federal contracts and grants." However, section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111-212) added the requirement that all the information in FAPIIS, except for past performance information, shall be posted on a publicly available Internet website. Therefore, any information in FAPIIS with regard to immediate owner,

subsidiaries, and predecessors, will be available to the public.

F. Applicability. This rule applies to commercial items, including commercially available off-the-shelf items, as well as acquisitions below the simplified acquisition threshold.

The information on predecessors is needed for all offerors for which a CAGE code is required. The information will be stored in the SAM database.

Determinations and findings were signed in February 2010 under FAR Case 2008-027, that section 872 of the NDAA for FY 2009, which established the FAPIIS database, applies to the acquisition of commercial items, including commercially available off-the-shelf (COTS) items. That determination stated that an exemption for commercial item acquisitions (including COTS items) would exclude a significant portion of Federal contractors, thereby undermining an overarching public policy to achieve greater integrity and performance quality in contracting. We should apply extensions of information to be used in FAPIIS to acquisitions of commercial items, including COTS items, for the same reasons we stated with regard to the original statute that established FAPIIS.

The representation will also apply to solicitations that do not exceed the simplified acquisition threshold.

Determinations and findings will be approved by the appropriate authorities prior to publication of the final rule.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the burden

is minimal to provide the CAGE Code and the name of all predecessors that held a Federal contract or grant within the last three years. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

The objective of this rule is to provide acquisition officials using FAPIIS a comprehensive understanding of the performance and integrity of the corporation in carrying out Federal contracts. The legal basis for the rule is section 852 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239).

The proposed provision in this rule would require each offeror to represent whether the offeror is or is not, within the last three years, a successor to a predecessor that held a Federal contract or grant within the last three years. If the offeror has indicated that it is such a successor, then the offeror must provide the CAGE code and legal name of all predecessors that held a Federal contract or grant within the last three years. The data on immediate owner and direct subsidiaries of an entity will be available through FAPIIS, based on the data obtained from offerors in response to the FAR provision 52.204-17, Ownership or Control of Offeror, that requires this information for the CAGE code. The Federal Government received offers from approximately 413,800 unique vendors in FY 2011. Approximately 275,900 of these offers were by unique small businesses, which will be required to respond to the proposed provision.

The proposed rule requires approximately one submission per year, with an estimated average of .1 preparation hours per response. The response time will be less for most respondents, only required to check a box. Only those respondents that check "is" will have to provide a minimal amount of information (CAGE Code and legal name of all predecessors that held a Federal contract or grant within the last three years). A mid-level professional skill would be required in some instances to know whether the entity is a successor, as defined in the proposed rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no exemptions from the rule for small entities, because the law does not provide for any such exemption. However, the proposed rule limits the review of predecessor entities to three years.

The Regulatory Secretariat has submitted a copy of the

IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2013-020), in correspondence.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat has submitted a request for approval of a new information collection requirement concerning Identification of Predecessor Entities to the Office of Management and Budget.

A. Public reporting burden for this collection of information is estimated to average .1 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data

needed, and completing and reviewing the collection of information.

The annual reporting burden estimated as follows:

Respondents: 413,800.

Responses per respondent: 1.

Total annual responses: 413,800.

Preparation hours per response: .1.

Total response Burden Hours: 41,380.

B. Request for Comments Regarding Paperwork Burden.

Submit comments, including suggestions for reducing this burden, not later than **[insert date 60 days after publication in the FEDERAL REGISTER]** to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street, NW, 2nd floor, Washington, DC 20405.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of

the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street, NW, 2nd floor, Washington, DC 20405. Please cite OMB Control Number 9000-00XX; Identification of Predecessors," in all correspondence.

List of Subjects in 48 CFR Parts 1, 4, 9, 22, and 52

Government procurement.

Dated: November 25, 2014.

William Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, the DoD, GSA, and NASA propose amending 48 CFR parts 1, 4, 9, 22, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 4, 9, 22, and 52 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106, in the table following the introductory text, by adding in numerical sequence, FAR segment "52.204-WW" and its corresponding OMB Control No. "9000-00XX".

PART 4—ADMINISTRATIVE MATTERS

3. Amend section 4.1202 by redesignating paragraphs (a)(6) through (29) as paragraphs (a)(7) through (30), respectively; and adding a new paragraph (6) to read as follows;

4.1202 Solicitation provision and contract clause.

(a) * * *

(6) 52.204-WW, Predecessor of Offeror.

* * * * *

4. Amend section 4.1804 by adding paragraph (d) to read as follows:

4.1804 Solicitation provisions and contract clause.

* * * * *

(d) Insert the provision at 52.204-WW, Predecessor of Offeror, in all solicitations that include the provision at 52.204-16, Commercial and Government Entity Code Reporting.

PART 9—CONTRACTOR QUALIFICATIONS

5. Amend section 9.104-6 by revising paragraphs (a) and (b) to read as follows:

9.104-6 Federal Awardee Performance and Integrity Information System.

(a) (1) Before awarding a contract in excess of the simplified acquisition threshold, the contracting officer shall review the integrity and performance information available in the Federal Awardee Performance and Integrity Information System (FAPIIS), available at www.ppirs.gov, then select FAPIIS, including FAPIIS information from the System for Award Management Exclusions and the Past Performance Information Retrieval System (PPIRS).

(2) In accordance with 41 U.S.C. 2313(d) (3), FAPIIS also identifies—

(i) An affiliate that is an immediate owner or subsidiary of the offeror, if any (see 52.204-17, Ownership or Control of Offeror); and

(ii) All predecessors of the offeror that held a Federal contract or grant within the last three years (see 52.204-WW, Predecessor of Offeror).

(b) When making a responsibility determination, the contracting officer shall consider all the information available through FAPIIS with regard to the offeror and any immediate owner, predecessor, or subsidiary identified for that offeror in FAPIIS, as well as other past performance information on the offeror (see subpart 42.15).

(1) For evaluation of information available through FAPIIS relating to an affiliate of the offeror, see 9.104-3(c).

(2) For source selection evaluations of past performance, see 15.305(a)(2). Contracting officers shall use sound judgment in determining the weight and relevance of the information contained in FAPIIS and how it relates to the present acquisition. Since FAPIIS may contain information on any of the offeror's previous contracts and information covering a five-year period, some of that information may not be relevant to a determination of present responsibility, e.g., a prior administrative action such as debarment or suspension that has expired or otherwise been resolved, or information relating to contracts for completely different products or services.

* * * * *

6. Amend section 9.105-1 by revising introductory paragraph (c) to read as follows:

9.105-1 Obtaining information.

* * * * *

(c) In making the determination of responsibility, the contracting officer shall consider information available through FAPIIS (see 9.104-6) with regard to the offeror and any immediate owner, predecessor, or subsidiary identified for that offeror in FAPIIS, including information that is linked to FAPIIS such as from the System for Award Management Exclusions, and the Past Performance Information Retrieval System (PPIRS), as well as any other relevant past performance information on the offeror (see 9.104-1(c) and subpart 42.15). In addition, the contracting officer should use the following sources of information to support such determinations:

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1006 [Amended]

7. Amend section 22.1006 by removing from paragraph (a)(2)(i)(C) the words "52.204-8(c)(2)(iii) or (iv)" and adding "52.204-8(c)(2)" in its place; and removing from

paragraph (e)(4)(i) the words "52.204-8(c)(2)(iv)" and adding "52.204-8(c)(2)" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Amend section 52.204-8 by—

- a. Revising the date of the clause;
- b. Redesignating paragraphs (c)(2)(ii) thru (vii) as paragraphs (c)(2)(iii) thru (viii), respectively; and
- c. Adding new paragraph (c)(2)(ii).

The revised and added text reads as follows:

52.204-8 Annual Representations and Certifications.

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS (DATE)

* * * * *

(c) * * *

(2) * * *

____(ii) 52.204-WW, Predecessor of Offeror.

* * * * *

9. Add section 52.204-WW, to read as follows:

52.204-WW Predecessor of Offeror.

As prescribed in 4.1804(d), insert the following provision:

PREDECESSOR OF OFFEROR (DATE)

(a) Definitions. As used in this provision—

Commercial and Government Entity (CAGE) code means—

(1) An identifier assigned to entities located in the United States and its outlying areas by the Defense Logistics Agency (DLA) Logistics Information Service to identify a commercial or government entity, or

(2) An identifier assigned by a member of the North Atlantic Treaty Organization (NATO) or by NATO's Maintenance and Supply Agency (NAMSA) to entities located outside the United States and its outlying areas that DLA Logistics Information Service records and maintains in the CAGE master file. This type of code is known as an NCAGE code.

Predecessor means an entity that is replaced by a successor and includes any predecessors of the predecessor.

Successor means an entity that has replaced a predecessor by acquiring the assets and carrying out the affairs of the predecessor under a new name (often through acquisition or merger). The term "successor" does not include new offices/divisions of the same company or a company that only changes its name. The extent of the responsibility of the successor for the liabilities of the predecessor may vary, depending on State law and specific circumstances.

(b) The offeror represents that it ☐ is or ☐ is not a successor to a predecessor that held a Federal contract or grant within the last three years.

(c) If the offeror has indicated "is" in paragraph (b) of this provision, enter the following information for all predecessors of the offeror that held a Federal contract or grant within the last three years (If more than one predecessor list in reverse chronological order):

Predecessor CAGE code: _____ (or mark "Unknown").
Predecessor legal name: _____.
(Do not use a "doing business as" name.)

(End of provision)

* * * * *

10. Amend section 52.212-3 by —

- a. Revising the date of the clause;
- b. Removing from the introductory paragraph the words "paragraphs (c) through (p)" and adding "paragraphs (c) through (q)" in its place;
- c. Adding to paragraph (a), in alphabetical order, the definitions "predecessor" and "successor";
- d. Removing from paragraph (b) (2) the words "paragraphs at (c) through (p)" and adding "paragraphs at (c) through (q)" in its place; and
- e. Adding paragraph (q).

The revised text reads as follows:

**52.212-3 Offeror Representations and Certifications--
Commercial Items.**

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (DATE)

* * * * *

(a) * * *

Predecessor means an entity that is replaced by a successor and includes any predecessors of the predecessor.

* * * * *

Successor means an entity that has replaced a predecessor by acquiring the assets and carrying out the affairs of the predecessor under a new name (often through acquisition or merger). The term "successor" does not include new offices/divisions of the same company or a company that only changes its name. The extent of the responsibility of the successor for the liabilities of the

predecessor may vary, depending on State law and specific circumstances.

* * * * *

(q) Predecessor of Offeror. (Applies in all solicitations that include the provision at 52.204-16, Commercial and Government Entity Code Reporting.)

(1) The offeror represents that it ☐ is or ☐ is not a successor to a predecessor that held a Federal contract or grant within the last three years.

(2) If the offeror has indicated "is" in paragraph (q)(1) of this provision, enter the following information for all predecessors that held a Federal contract or grant within the last three years (If more than one predecessor, list in reverse chronological order):

Predecessor CAGE code: _____ (or mark "Unknown").
Predecessor legal name: _____.
(Do not use a "doing business as" name)

* * * * *

[BILLING CODE 6820-EP]

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